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9 Attorneys for Plaintiffs
10 ROBERT ALEXANDER KASEBERG
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ROBERT ALEXANDER KASEBERG,) Case No.: 15cv01637JLSDHB
Plaintiff,)
vs.)
CONACO, LLC; TURNER)
BROADCASTING SYSTEM; TIME)
WARNER, INC.; CONAN O'BRIEN;)
JEFF ROSS; MIKE SWEENEY; DOES 1)
- 10, inclusive,)
Defendants.)

) **DECLARATION OF JAYSON M.**
) **LORENZO IN SUPPORT OF**
) **PLAINTIFF ROBERT**
) **ALEXANDER KASEBERG'S**

) **OPPOSITION TO DEFENDANTS'**
) **MOTION IN LIMINE NO. 2 TO**
) **EXCLUDE THE TESTIMONY OF**
) **DAVID BARKSY AT TRIAL**

)
Date: April 11, 2019
Time: 1:30 p.m.
Dept: 4D

1 I, JAYSON M. LORENZO, hereby declare as follows:

2 1. I am an attorney duly licensed to practice in the State of California
3 and before the District Court for the Southern District of California. This
4 declaration is based on personal knowledge of the matters set forth herein.

5 2. I am an attorney of record for Robert Alexander Kaseberg in the
6 instant matter.

7 3. Attached hereto as Exhibit 1 is a true and correct copy of the Expert
8 Report of David Barsky, Ph.D.

9 4. Attached hereto as Exhibit 2 is a true and correct copy of excerpts of
10 the deposition testimony of David Barsky, Ph.D.

11 5. Attached hereto as Exhibit 3 is a true and correct copy of excerpts of
12 the deposition testimony of Michael Sweeney.

13 6. Attached hereto as Exhibit 4 is a true and correct copy of excerpts of
14 the deposition testimony of Robert Alexander Kaseberg.

15 I declare under penalty of perjury under the laws of the United States that
16 the foregoing is true and correct.

17 Executed this 21st day of March 2019, at Los Angeles, California.

18
19 */s/jayson m. lorenzo*
20 JAYSON M. LORENZO
21 Attorney for Plaintiff
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EXHIBIT 1

Robert Alexander Kaseberg

v.

Conaco, LLC et. al.

**United States District Court for the
Southern District of California
Case No. 15-CV-01637-JLS-DHB**

**Expert Opinions
of
David J. Barksy, Ph.D.**

Qualifications: I, David J. Barsky, Ph.D., am Associate Professor of Mathematics at California State University San Marcos. My research specialty is percolation theory, a branch of probability theory. I am being compensated at a rate of \$275/hour. Attached hereto is a copy of my most recent c.v. I have not testified as an expert at trial or by deposition for any cases within the previous four years.

Factual Background:

1. The "Conan" show featured jokes published by the Plaintiff in the monologues of episodes that aired on
 - December 3, 2014
 - January 14, 2015
 - February 4, 2015
 - February 17, 2015
 - June 9, 2015

(Source: First Amended Complaint of Robert Alexander Kaseberg (Case No. 3:15-cv-01637-JLS-DHB)

2. Counts of numbers of other Conan episodes with monologues in the months of June 2014 through June 2015:
 - 82 episodes from May 7, 2014 through November 20, 2014, inclusive
 - 2 episodes from December 1, 2014 through December 2, 2014, inclusive
 - 15 episodes from December 4, 2014 through January 13, 2014, inclusive
 - 11 episodes from January 15, 2015 through February 3, 2015, inclusive
 - 4 episodes from February 5, 2015 through February 11, 2015, inclusive
 - 5 episodes from February 18, 2015 through February 25, 2015, inclusive
 - 40 episodes from March 2, 2015 through June 8, 2015, inclusive

(Source: Direct counts that I made on Friday, October 14, 2016 and Thursday, October 27, 2016 from the archive pages for Conan monologues:
teamcoco.com/category/video-category/monologue?page=18 through
teamcoco.com/category/video-category/monologue?page=37)

3. Estimate of 10 jokes per monologue.
(Source: Page 49 of deposition of Michael Sweeney)

Additional Assumption:

4. This analysis assumes a relatively constant rate of joke-writing by the Plaintiff throughout the period June 2014 through June 2015.

Opinion:

I was asked to examine the pattern of jokes published by the Plaintiff that appeared in Conan monologues, and specifically whether this pattern suggested that this might be a chance occurrence.

I compared the period December 2014 through February 2015 during which a cluster of four jokes published by the Plaintiff appeared in Conan monologues to the pair of equivalent periods that immediately preceded and followed it. If the jokes were independently conceived by the writers for Conan, then the probability of seeing no more than one joke published by the Plaintiff in the union of the immediately prior and following periods is a probabilistically unlikely event.

This opinion does not change when the analysis is repeated, this time comparing the longer period that includes the occurrence of the additional joke in June 2015 to an equivalent prior period.

Analyses

I construct the following mathematical model to describe the situation in which all of the jokes featured in the Conan monologues are written without any prior knowledge of the jokes published by the Plaintiff:

- A. The Plaintiff viewing current events and writes and publishes a collection of jokes on his blog and out Twitter account.
- B. The writers of the Conan show are unaware of the jokes published by the Plaintiff and they also respond to current events by writing jokes, ten of which are selected for the monologue of each show.
- C. Each joke has a small probability, p , of matching one of the published jokes of the Plaintiff. The parameter p measures the degree to which the writers and the Plaintiff see the same humor in current events; the more “in tune” that they are, the higher p will be. The combination of Background Fact 3 and Assumption 4 implies that p is relatively constant; this analysis assumes that p is constant.
- D. Let X stand for the number of “overlapped” jokes, that is, jokes that were both featured in the monologues and previously published by the Plaintiff. Then X is a binomial random variable, which has a well-known distribution: The probability of seeing that $X = n$ when the “overlap” probability is p and a total of N jokes are examined is

$$\text{Prob}_{p,N}(X = n) = \frac{n! (N - n)!}{N!} p^n (1 - p)^{N-n}$$

- E. A standard way to estimate the unknown parameter p is to use the maximum likelihood method: given the observation of exactly n “overlapped” jokes in a collection of N jokes, one finds the value of p which makes the probability $\text{Prob}_{p,N}(X = n)$ as large as possible. This is another standard result: The maximum likelihood estimate for p is $\hat{p} = \frac{n}{N}$.

This model is now used as follows:

F. The episodes are grouped to compare periods the “overlap” between the Plaintiff’s lists of published jokes and the jokes featured in the Conan monologues. This is done in two ways.

1. We first use a period that contains the cluster of the four “overlapped” jokes in the months of December 2014, January 2015 and February 2015. The choice of beginning and endpoints of these periods is somewhat arbitrary, so we simply use calendar months. That three-month period is then compared to a pair of periods with equivalent episodes both before and after these three months. If each featured monologue joke has the same small random chance of being one of the Plaintiff’s previously published jokes, then we would expect to see a total of eight similarly repeated jokes in the periods immediately prior and following, four in the prior period and four in the subsequent period. In fact, only one such joke is found (it was in the following period) and the probability of seeing no more than one joke in the combined periods is computed and found to be less than 1%.
2. The analysis is then repeated to compare the longer period from the beginning of December 2014 through June 9, 2015. This period, during which five jokes published by the Plaintiff were featured in Conan monologues, is compared to the equivalent prior period. The expected number of jokes predicted by the model in the prior period is five, and yet no such jokes were observed. The probability of no jokes appearing on both lists is less than 1% if the jokes are being generated independently as the model assumes.

G. There were approximately 410 jokes featured in the monologues of the 41 episodes that aired the months of December 2014, January 2015 and February 2015, and 4 of these jokes were “overlapped.” The maximum likelihood estimate for the “overlap” probability is then $\hat{p} = \frac{4}{410} = \frac{2}{205}$. In other words, during this period of time, the chance of any joke featured in a Conan monologue having previously been published by the Plaintiff is approximately 1%. It also is the case that the expected number of “overlapped” jokes in any period of 41 episodes will be 4.

H. Now let us consider the 41 episodes immediately prior to the period examined in F (i.e., September 4, 2014 through November 20, 2014, inclusive) and the 41 episodes immediately following the same period (i.e., March 2, 2015 through June 9, 2015, inclusive). If the assumptions of the model are correct, then the probability of seeing no “overlapped” jokes in one of the adjacent periods is

$$\text{Prob}_{\hat{p},N}(X = 0) = (1 - \hat{p})^N = \left(\frac{203}{205}\right)^{410} \simeq 0.018,$$

and the probability of seeing exactly one “overlapped” jokes in an adjacent period is

$$\text{Prob}_{\hat{p},N}(X = 1) = N\hat{p}(1 - \hat{p})^{N-1} = 410 \left(\frac{2}{205}\right) \left(\frac{203}{205}\right)^{409} \simeq 0.073.$$

Since the events of “overlapped” jokes occurring in prior and subsequent periods are independent, the probability see no more than one “overlapped” joke in the combined periods is

$$[\text{Prob}_{\hat{p},N}(X = 0)]^2 + 2[\text{Prob}_{\hat{p},N}(X = 0)][\text{Prob}_{\hat{p},N}(X = 1)] \simeq 0.003 = 0.3\%.$$

I. A similar (one-sided) analysis can be performed using a single longer time period that contains all five of the jokes listed in Background Fact 1. There were approximately 820 jokes featured in the monologues of episodes that aired between December 1, 2014 and June 9, 2015, inclusive, and 5 of these jokes were overlapped. The maximum likelihood estimate for the “overlap” probability is then $\hat{p} = \frac{5}{820} = \frac{1}{164}$, and the expected number of overlapped jokes in any period of 82 episodes is 5. Then the probability of observing no “overlapped” jokes in the 82 immediately prior episodes (May 7, 2014 through November 20, 2014, inclusive) is

$$\text{Prob}_{\hat{p},N}(X = 0) = (1 - \hat{p})^N = \left(\frac{163}{164}\right)^{820} \simeq 0.007 = 0.7\%.$$

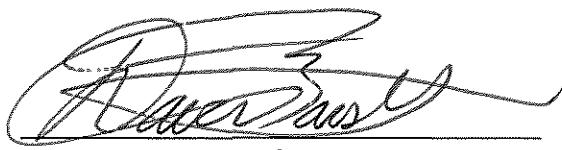
Summary:

The clustering of the four “overlapped” jokes published by the Plaintiff in a relatively short period time surrounded by stretches where there are no “overlapped” jokes makes their having been independently conceived by the writers for Conan such a probabilistically unlikely event; I estimate the probability of there having been no more than one “overlapped” joke in the combined 41 preceding and 41 following (which is the case) to be on the order of $\frac{1}{3}$ of 1%. Even after taking into account the existence of one more “overlapped” joke half a year later, it still is unlikely that the writers were independently developing the same jokes as the Plaintiff; if the jokes had been written independently, the estimated probability of seeing no “overlapped” jokes in the period May 7, 2014 through November 20, 2014 (which is the case) is still less than $\frac{3}{4}$ of 1%.

Materials Reviewed:

- First Amended Complaint of Robert Alexander Kaseberg (Case No. 3:15-cv-01637-JLS-DHB)
- Page 49 of deposition of Michael Sweeney
- Archive pages for Conan monologues:
teamcoco.com/category/video-category/monologue?page=18 through
teamcoco.com/category/video-category/monologue?page=36.
 (Viewed Friday, October 14, 2016)

I understand that discovery is continuing and I reserve the right to modify this opinion as may be necessary if additional facts become known.



David J. Barsky

10/27/16

Date

David J. Barsky

Education

Ph.D., Rutgers—The State University of New Jersey (New Brunswick), Mathematics, 1987.
Dissertation: Critical Points and Critical Exponents in Percolation and Ising-Type Models.
Advisor: Michael Aizenman.

B.S., University of Delaware, Mathematics and Physics, cum laude, 1981.

Employment

Associate Professor of Mathematics (7/97 – present), California State University San Marcos

Associate Vice President for Academic Programs (7/98 – 6/13), California State University San Marcos

Assistant Professor of Mathematics (7/95 – 6/97), California State University San Marcos

Assistant Professor of Mathematics (7/89 – 6/96) and National Science Foundation Mathematical Sciences Postdoctoral Fellow (7/89 – 3/91), University of California, Davis

Research Associate in Mathematics (1/87 – 6/89) and National Science Foundation Mathematical Sciences Postdoctoral Fellow (9/87 – 6/89), University of Arizona

Publications

Michael Aizenman and David J. Barsky. "Sharpness of the phase transition in percolation models." *Comm. Math. Phys.* **108**, 489-526 (1987).

M. Aizenman, D.J. Barsky and R. Fernandez. "The phase transition in a general class of Ising-type models is sharp." *Jour. Stat. Phys.* **47**, 343-374 (1987).

D. Barsky. "Explicit calculation of the effective conductivity for a one-dimensional model." Appendix to "Discontinuous behavior of effective transport coefficients in quasi-periodic media," by K. Golden, S. Goldstein, ad J.L. Lebowitz. *Jour. Stat. Phys.* **58**, 681-683 (1990).

David J. Barsky, Geoffrey R. Grimmett and Charles M. Newman. "Dynamic renormalization and continuity of the percolation transition in orthants." *Spatial Stochastic Processes*, eds. K. Alexander and J. Watkins, Birkhauser, Boston (1991).

David J. Barsky, Geoffrey R. Grimmett and Charles M. Newman. "Percolation in half-spaces: Equality of critical densities and continuity of the percolation probability." *Probab. Th. Rel. Fields*. **90**, 111-148 (1991).

David J. Barsky

D.J. Barsky and M. Aizenman, "Percolation critical exponents under the triangle condition." *Ann. Probab.* **19**, 1520-1536 (1991).

Kenneth L. Verosub, Elbridge Gerry Puckett, Igor Aleinov, David J. Barsky, Janko Gravner ad Jeremy Quastel. "A Ising model approach to the behavior of the Earth's magnetic field." Poster at 1993 Spring Meeting of American Geophysical Union, Mineralogical Society of America and Geochemical Society, published as a supplement to *EOS* (April 20, 1993).

David J. Barsky and Alberto Gadolfi, "A generalized maximum pseudo-likelihood estimator for noisy Markov fields." *Ann. Appl. Probab.* **5**, 1095-1125 (1995).

David J. Barsky and C. Chris Wu, "Critical exponents for the contact process under the triangle condition." *Jour. Stat. Phys.* **91**, 95-124 (1998).

Presentations (given while at CSU San Marcos)

"Which came first, the Airy Equation or the Airy Function?"

January 1997; National Meeting of the Mathematical Association of America; San Diego
Also: June 1997; Institute on the History of Mathematics and Its Use in Teaching;
Washington, D.C.

"Introduction to Percolation Theory."

April 1997; Hentschke Seminar, University of Redlands
Also: January 1998; Claremont Mathematics Colloquium; Harvey Mudd College

"Computer Laboratories in Mathematics Classes Using Maple."

May 1997; Institute for Teaching and Learning Showcase; CSU Long Beach

"Mathematical Insight through CAS Worksheets."

October 1997; Cuccicu-Tech Showcase, San Francisco State University

"Wallis, Fourier, Cauchy and Abel: A Thread in Analysis."

October 1997; Joint Regional/Sectional Meeting of the American Mathematical Society and the Mathematics Association of America; Claremont, CA
Also: November 1997; Mathematics Colloquium; CSU San Marcos

"Mathematics Acceleration Program in the Summer (MAPS) at San Marcos."

December 2003; CSU Student Success Conference; Los Angeles

Also: January 2004; Academic Assembly; CSU San Marcos

Also: July 2004; First Year Programs Conference; CSU San Marcos

"Lower-Division Roadmaps."

October 2006; Poster presentation with Joanne Pedersen; CSU Campus Practices for Student Success Conference, Los Angeles,

"Effective Partnerships between Student Affairs and Academic Affairs for Developing Innovative Strategies Promoting Student Success."

November 2011; With Joanne Pedersen, Lorena Meza and Geoffrey Gilmore; Student Affairs Administrators in Higher Education (NASPA) Western Regional Conference; San Diego

David J. Barsky

University Governance (at CSU San Marcos)

Major Areas of Responsibility as Associate Vice President for Academic Programs

- Oversight of the University curriculum approval processes (1998 – 2013)
- General Education program (1998 – 2013)
- University Catalog (1998 – 2013)
- Program Review and Program Assessment (1998 – 2006, 2007-09, 2011-13)
- Academic Master Planning (1998 – 2010)
- Palomar Mathematics Remediation Coordinator (1998 – 2010)
- Event/Meeting Scheduling (1998 – 2006)
- Academic Planning Database (APDB) Reporting to the Chancellor's Office (1998 – 2005)
- Community Service Learning (1998-2003)
- Graduate Studies (1998-2001)
- University Honors Program (1998 – 2000)
- Class Schedule (1998 – 2012)
- Collaborative Academic Preparation Initiative (CAPI) (1999-2003)
- Learning Assistance Programs: Computer Consulting Center, Math Lab and Writing Center (1999 – 2003)
- WASC Accreditation Liaison Officer (2000-02)
- Emergency Management Planning (2001-13)
- Southwest Riverside County Programs (2003-05)
- Director of First Year Programs (2003-13)
- Early Start Program (2012 – Present; Coordination responsibilities continue as a faculty member)

College Governance (at CSUSM, pre-Administrative Career):

- Member, College of Arts and Sciences Organizational Task Force (1995-96)
- Chair, College of Arts and Sciences Hiring Priorities Committee (1996-97)

Academic Senate

- Secretary-elect (1998)
- General Education Committee [GEC]
 - 1996-1998: Faculty member (Chair in 1997-98)
 - 1998-2013: Non-voting, ex-officio member
- Academic Programs and Policy [APP] Committee (split into APC and UCC in 2002)
 - 1997-1998: Faculty member
 - 1998-2002: Non-voting, ex-officio member
- Academic Policy Committee [APC]
 - 2002-2013: Non-voting, ex-officio member
 - 2013-Present: Faculty member (Chair, 2015 – Present)
- University Curriculum Committee [UCC]
 - 2002-2013: Non-voting, ex-officio member
- Program Assessment Committee [PAC]
 - 1998-2010 and 2011-2013: Non-voting, ex-officio member
- Budget and Long-Range Planning Committee
 - 2000-2008: Non-voting, ex-officio member

David J. Barsky

- Academic Senate Executive Committee [EC]
 - 1997-1998 and 2013-Present: Faculty member
- (Statewide) Academic Senate of the California State University [ASCSU] (2013 – Present)
 - Vice Chair, Academic Preparation and Education Programs Committee (2014-16)
 - ASCSU liaison to the CSU Math Council (2014-16)
 - ASCSU representative on the Early Start Implementation Committee (2014-15)
 - ASCSU representative on the Early Assessment Program Advisory Committee (2015-16)
 - CSU Quantitative Reasoning Task Force, Drafting Member (2016)

Major Mathematics Department Responsibilities (at CSU San Marcos)

Mathematics Single-Subject Preparation Program Coordinator (1995-97)

Mathematics Program Director [precursor to the Mathematics Department Chair position] (1997-98)

Oversight of Instruction in all Pre-Baccalaureate Mathematics Courses (2014-Present)

Other Assignments Since Returning to Faculty

Commencement Planning and Marshal Coordination (as administrator: circa 2000-2013, as faculty: 2013 – Present)

Early Start Program Coordinator (as administrator: 2012-2013, as faculty: 2013 – Present)

Member, Task Force on Class Scheduling (2013-14)

Chair, CSM Engineering Feasibility Study Faculty Task Group (Spring 2015)

Member, Core Competencies Task Force (Spring 2015)

Major Grants (funded)

Co-author, Year Round Operations Planning Grant, \$179K (1999-2000)

Co-author, Collaborative Academic Preparation Initiative proposal, \$1.136M (1999-2002)

Co-author, Service-Learning Curriculum and Infrastructure Development Initiative proposal, \$190K, (2000-01)

David J. Barsky

Courses Taught (at CSU San Marcos)

Degree-credit-bearing courses:

MATH 115	College Algebra
MATH 131*	Modeling with Algebra
MATH 160	Calculus with Applications, I
MATH 162*	Calculus with Applications, II
MATH 260*	Calculus with Applications, III
MATH 330	Introduction to the History of Mathematics
MATH 350	Foundations for Theoretical Mathematics
MATH 362	Differential Equations
MATH 430	Foundations of Analysis
MATH 440	Mathematical Statistics
MATH 490	Senior Seminar
MATH 510	Mathematical Communication
MATH 530*	Measure Theory
MATH 570*	Mathematical Modeling
MATH 699	Thesis

Non-degree-credit mathematics programs and courses

- Mathematics component of the Young Scholars Summer Academy [YSSA] (for rising 9th graders)
- Mathematics component of Let's Encourage Academic Performance [LEAP] (for rising 7th/8th graders)
- Mathematics Acceleration Program in the Summer [MAPS] (for entering first-year CSUSM students)
 - Developed program in 2003; coordinated and taught in the program every summer since 2003;
 - ESM 005* (Summer Experience in Mathematics)

* Taught the inaugural section of this course at CSUSM.

Honor Societies

- Pi Mu Epsilon, Delaware Alpha chapter, 1980 (Mathematics)
- Sigma Pi Sigma, University of Delaware chapter, 1981 (Physics)
- Sigma Xi, University of California, Davis chapter, 1996 (Scientific Research)
- Golden Key International Honor Society, California State University San Marcos, 2009 (Academic excellence, leadership and service; Honorary member)
- Alpha Lambda Delta, California State University San Marcos, 2010 (Freshman Honors; Founding Faculty member)

David J. Barsky

Awards (received at CSU San Marcos)

- Friend of Student Affairs Award (2007)
- Educational Opportunity Program Faculty Advocate Award (2012)
- Ernest and Leslie Zomalt Outstanding Service Award [highest service award for an administrator at CSU San Marcos; awarded every other year to one CSUSM administrator selected for his/her contribution toward the achievement of the university's mission and demonstrated service to the campus community] (2012)

October 27, 2016

EXHIBIT 2

ORIGINAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ROBERT ALEXANDER KASEBERG,)
)
)
 Plaintiff,)
)
)
 vs.) Case No.
)
)
CONACO, LLC; TURNER) 3:15-CV-01637-JLS-DHB
BROADCASTING SYSTEM; TIME)
WARNER, INC.; CONAN O'BRIEN;)
JEFF ROSS; MIKE SWEENEY; DOES)
-50, inclusive,)
)
 Defendants.)
)

DEPOSITION OF DAVID J. BARSKY, taken at 111 West
Ocean Boulevard, 4th Floor, Long Beach,
California, on Thursday, December 22, 2016, at
9:58 A.M., before Moses Perez, Certified Shorthand
Reporter No. 12590, in and for the State of
California.

DAVID BARSKY

December 22, 2016

1 APPEARANCES:

2

3 For Plaintiff:

4 JAYSON M. LORENZO, ESQ.
5 Attorney at Law
6 2794 Gateway Road, Suite 116
7 Carlsbad, California 92009
8 (760) 517-6646
9 jmlorenzo.esq@gmail.com

10

11 For Defendants:

12 REX HWANG , ESQ.
13 Glaser, Weil, Fink, Howard, Avchen & Shapiro LLP
14 10250 Constellation Boulevard, 19th Floor
15 Los Angeles, California 90067
16 (310) 553-3000
17 rhwang@glaserweil.com

18

19

20

21

22 Also Present:

23

24 Carissa Narciso, Videographer

25

-2-

DAVID BARSKY

December 22, 2016

1 statement as to all opinions that you will express and the
2 basis and reasons for those opinions?

3 A I think so. Yes.

4 Q Are you prepared to discuss all those opinions
5 today?

6 A I am.

7 Q Does your report include all facts and data
8 considered by you in forming your opinions?

9 A There was one more piece of -- of data that I
10 reviewed after -- for seeing the rebuttal report.

11 Q Okay. What was that other piece of data?

12 A And that was a portion of the plaintiff's
13 deposition where he stated that he wrote seven to eight
14 jokes per day to his blog prior to show time.

15 Q So just to be clear, you read a portion of
16 Mr. Kaseberg's deposition transcript --

17 A Mr. Kaseberg's deposition. A single page.

18 Q One page? I -- I don't suppose you remember the
19 page?

20 A I do not remember the page.

21 Q And that page contained a statement saying
22 something to the effect of he writes seven to eight jokes
23 a day; is that right?

24 A They post seven to eight jokes per day to his
25 blog.

DAVID BARSKY

December 22, 2016

1 Q So you don't know if there were more --
2 potentially more instances of overlap between jokes
3 created by Conan's staff that did not make it to the show
4 and Mr. Kaseberg's jokes; correct?

5 A That is correct. Again, it's not really relevant
6 to the model.

7 Q So would you agree that there could have been more
8 instances of overlap between jokes created by Conan's
9 staff and jokes created by Mr. Kaseberg during the June,
10 2014, and June, 2015, time period?

11 A No, because the definition of overlap is a joke
12 that was previously on Mr. Kaseberg's blog and that was
13 then featured in the monologue. And so jokes that weren't
14 featured in the monologue can't meet that definition.

15 Q So let's go to that real quick. So your analysis
16 really hinges on how we define overlap; correct?

17 A I believe so.

18 Q And how would you define overlap as used in your
19 report?

20 A So a joke that was -- appeared in Mr. Kaseberg's
21 blog prior to the -- to the taping of the show and that
22 which then appeared in the monologue.

23 Q And so if the definition of overlap is expanded to
24 include instances where Conan's jokes may have come before
25 Mr. Kaseberg's jokes, your analysis would be incorrect;

DAVID BARSKY

December 22, 2016

1 correct?

2 THE WITNESS: Could you repeat that, please.

3 (The reporter read the question as follows:

4 "QUESTION: And so if the definition of overlap is
5 expanded to include instances where Conan's jokes
6 may have come before Mr. Kaseberg's jokes, your
7 analysis would be incorrect; correct?"

8 THE WITNESS: What do you mean by Conan's jokes
9 came by Mr. Kaseberg's?

10 Q BY MR. HWANG: So let's assume that both Conan
11 O'Brien -- so here's an assumption that I want you to
12 make.

13 Let's assume that Conan O'Brien and Mr. Kaseberg
14 told the exact same joke on the same day; correct? Do you
15 understand?

16 A I understand.

17 Q Now, in this situation though, Conan O'Brien told
18 his joke first, and then Mr. Kaseberg told his joke after
19 Conan O'Brien told the joke. Do you understand that?

20 A I understand that.

21 Q So if it's assumed that overlap could include an
22 instance where Conan actually told the joke first, would
23 your analysis still hold up?

24 A Yes, because the analysis is predicated on asking
25 the question of are jokes that were, you know, written by

-40-

DAVID BARSKY

December 22, 2016

1 Mr. Kaseberg beforehand -- are they showing up in -- in
2 Conan's monologue.

3 Q No, no, no. I think you missed my question.

4 A Oh, I'm sorry.

5 Q I want you assume -- and I'm -- I want you to
6 assume that your definition of overlap is incorrect.

7 A Okay.

8 Q So it's assumption that I want you to make. Your
9 definition of overlap I want you to assume is too limited.
10 Do you understand?

11 A Yes.

12 Q So under my assumption, I want you to assume that
13 overlap can include an instance where Conan told his joke
14 first. Do you understand that?

15 A Yes.

16 Q Now, if that assumption is made that overlap can
17 include an instance where Conan actually told the joke
18 first, would your probability analysis still hold up?

19 A It's a different model now. It's a completely
20 different situation.

21 Q So your analysis would be -- strike that.

22 So if you take that assumption that the definition
23 of overlap can be changed, you would have to use a
24 different model to approximate the probabilities that
25 you're looking for in your analysis; correct?

-41-

DAVID BARSKY

December 22, 2016

1 A That would be correct. Would you like me to
2 expand on that or no?

3 Q I think we will get there. So --

4 A Okay.

5 Q Now, do you know of any instances where Conan told
6 a similar joke to Mr. Kaseberg where Conan told the joke
7 first?

8 A I don't know firsthand of any. I mean, I -- you
9 know, I don't know of any particular jokes. I do know --
10 I mean, I have heard that Mr. Kaseberg might be inspired
11 by Mr. Conan's jokes and post them. But as I said, that's
12 a different -- that's partly why it is that this question
13 of -- of jokes that appear on the monologue showing up in
14 one -- one of Mr. Kaseberg's account is a different --
15 different question than -- than the one that I have
16 prepared my report on.

17 Q Did you ask to see that information?

18 A No.

19 Q Did you ever consider the fact that that might be
20 relevant to your analysis?

21 A No. I don't believe it is.

22 Q Isn't it possible that there are more instances of
23 jokes overlapping between Conan O'Brien and Mr. Kaseberg
24 than are listed in the complaint?

25 MR. LORENZO: Objection. Calls for speculation.

-42-

DAVID BARSKY

December 22, 2016

1 So you considered five jokes as a part of your
2 analysis; correct?

3 A Right.

4 Q And those are the five jokes that have been
5 asserted in this lawsuit; correct?

6 A Correct.

7 Q And for all five jokes, you assumed that
8 Mr. Kaseberg told those jokes first; correct?

9 A Correct.

10 Q Now, if you assume that Mr. O'Brien actually came
11 up with one of those five jokes first, would that impact
12 your analysis?

13 A Then that joke would no longer be an overlapped
14 jokes, and that would change the analysis.

15 Q And so if there is a situation where Mr. O'Brien's
16 joke -- strike that.

17 If there is a situation for the five asserted
18 jokes where Conan O'Brien actually came up with the joke
19 first, then that should be excluded from your analysis;
20 correct?

21 A If Mr. O'Brien came up with the joke first, then
22 that no longer qualifies as a overlapped joke. And, yes,
23 that should be counted differently in the analysis.

24 Q And assuming that happened, your probability
25 analysis would have changed. The conclusions from your

EXHIBIT 3

CONFIDENTIAL PER PROTECTIVE ORDER

Michael Sweeney

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

ROBERT ALEXANDER KASEBERG,)
)
Plaintiff,)
)
vs.) No. 15-CV-0167-JLS-DHB
)
CONACO, LLC, et al.,)
)
Defendants.)
)

DEPOSITION OF MICHAEL SWEENEY

Irvine, California

Wednesday, June 22, 2016



Reported by:
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CONFIDENTIAL PER PROTECTIVE ORDER

Michael Sweeney

CONFIDENTIAL PER PROTECTIVE ORDER

Michael Sweeney

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21
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24
25

CONFIDENTIAL PER PROTECTIVE ORDER

Michael Sweeney

1 Q Never?

2 A No, I was terrified.

3 Q Terrified why?

4 A That was a joke. I, I just didn't -- I didn't
5 want anything to do with Mr. Kaseberg, and I didn't want
6 to visit any of his sites.

7 Q So your testimony is to this day you have not
8 gone to his site. The only thing you viewed on his site
9 is the blog posting about you?

10 A Yes, that's correct.

11 Q Do you know if anyone at the Conan show is
12 regularly monitoring Mr. Kaseberg's Twitter page?

13 A If anyone is regularly --

14 Q Monitoring his Twitter page.

15 A Currently?

16 Q Yes.

17 A Yes.

18 Q When did that start?

19 A That started when the lawsuit was filed.

20 Q Okay. So prior to that, nobody was monitoring --

21 A No.

22 Q To your knowledge, was monitoring his site?

23 MS. VAN LOON: He testified that nobody had ever
24 looked at his Twitter before that.

25 THE WITNESS: No. No one -- none of the writers were

EXHIBIT 4

ROBERT A. KASEBERG

September 20, 2016

11
12
13 THE VIDEOTAPED DEPOSITION OF ROBERT ALEXANDER
14 KASEBERG, taken at 90 Pacifica, Irvine, California, on
15 Tuesday, September 20, 2016, beginning at 10:03 a.m.,
16 before Stephanie Hardesty, CSR No. 13088, a Deposition
17 Officer.

ROBERT A. KASEBERG

September 20, 2016

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17 Dash Arnott, Videographer

18

19

20

21

22

23

24

25

ROBERT A. KASEBERG

September 20, 2016

1 or no?

2 A. No.

3 Q. Okay. "No," you have no other evidence?

4 A. I -- I'm not aware of any other evidence.

5 Q. Okay. How many jokes do you post to your blog
6 every day?

7 A. It varies. I would guess on average seven or
8 eight.

9 Q. Do you do that every day?

10 A. I try to, yeah.

11 Q. What is the purpose of maintaining your blog?

12 A. Contacts, networking.

13 Q. And is it fair to say that the majority of the
14 content you post to the blog are monologue-style jokes?

15 A. No. Nothing -- it's anything. It's -- it's an
16 online diary. It's a way of keeping up with friends.

17 Q. Okay.

18 A. This was my Facebook before there was Facebook.

19 Q. Okay. But isn't it the case that you post a lot
20 of monologue-style jokes on your blog?

21 A. I post whatever I think is funniest, yeah.

22 Q. Sure.

23 A. But usually the majority is probably monologue
24 jokes.

25 Q. Okay. I think we talked about this a little bit